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In the Supreme Court of the United States

OCTOBER TERM, 1974

FEDERAL POWER COMMISSION, PETITIONER

v.

JOHN E. MOSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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1. Respondents argue that Section 7(b) bars the Commission from simultaneously issuing a certificate for a *long-term* sale of natural gas and authorizing the producer to terminate the sale at the end of the term. In *Sunray I*, however, where the Tenth Circuit held that Section 7(b) is *not* a bar to authorizing future discontinuance of service at the same time that the service itself is certificated, the proposed sale was for a primary term of 10 years (239 F.2d at 98). And in *Sunray II*, where this Court endorsed the Tenth Circuit's holding in *Sunray I*, the proposed sale was for a term of 20 years (364 U.S. at 139). As those decisions make clear, the length of the underlying service contract has no bearing on the Commission's authority under Section 7(b) to authorize both the initiation and future abandonment of a jurisdictional sale, although the length of the term might, in a particular case, bear on the Commission's willingness to exercise that authority.

2. Respondents also argue that Order No. 455 adopts an improper standard for determining whether future termination of service should be approved. The Commission, they assert, would authorize a producer to abandon the sale of gas to an interstate purchaser "simply because that producer would rather sell its gas in the unregulated, intrastate market" (APGA Br. in Opp. 5). Nothing in Order No. 455 supports that assertion.

The Commission recognized that some producers may be unwilling to make an indefinite commitment to the interstate market and that otherwise available supplies were for that reason made unavailable to interstate purchasers. Order No. 455 is designed in part to attract those supplies to the interstate market by permitting the Commission, in an appropriate case and when the public interest would thereby be served, to give a producer advance assurance that his commitment will terminate on a date certain. But the Commission's willingness to take account of commercial realities does not imply a departure from the statutory public interest standard. The producer's desire for advance abandonment authority *triggers* the Commission's consideration of the request, but the decision whether to grant the request turns solely on the Commission's determination of the "present or future public convenience or necessity" under Section 7(b).

It is settled, of course, by this Court's decision in *Sunray II* that the Commission is not required to authorize future termination of service merely because the producer requests such authorization in its application for a certificate. It is also clear that the Commission is not required to approve abandonment of a previously certificated sale merely because the producer would prefer to serve the intrastate market.

But when an application for a certificate under the optional procedure established by Order No. 455 is conditioned upon advance authorization of future discontinuance—that is, when the producer agrees to serve a particular interstate purchaser for a specified term of years only if it is assured that its commitment may be terminated on a date certain[1]—it is surely within the proper scope of the Commission's authority to weigh the public need for the gas during the specified term, and to determine whether that need justifies giving the applicant the advance assurance requested. To deny that this is a proper element of the public interest would be to deprive the Commission of an essential tool for attracting needed incremental gas supplies to the interstate market during the present period of critical shortage.

Order No. 455 does not *compel* the Commission to authorize pre-granted abandonment upon the request of the applicant. It provides that the Commission may do so if, but only if, the Commission first determines "that the present or future public convenience and necessity per-

[1]If, for example, a producer discovers and develops a new supply of natural gas and enters into a contract to sell that gas to a specific purchaser commencing at a future date, he may be willing to sell the gas in the interim period to another interstate purchaser but only if he is assured that he may discontinue the interim sale at the end of the contract term so that he can fulfill his future contractual obligation to the original purchaser. See, *e.g., Tenneco Oil Co,* FPC Dkt. No. CI75-104 (order issued October 21, 1974).

mits such abandonment" (Pet. App. 55a).[2] That determination, of course, would in every case be subject to judicial review.

Respectfully submitted.

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MAY 1975.

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[2]See, *e.g.*, *Belco Petroleum Corp., et al.*, 49 FPC 1154, set aside and remanded on other grounds *sub nom. Consumers Union of the United States, Inc.* v. *Federal Power Commission*, C.A. D.C., Nos. 73-1792, *et al.*, decided October 7, 1974, where the Commission rejected a request for pre-granted abandonment under the optional certificate procedure on the ground that the record did not support the necessary findings. The Commission there stated (49 FPC at 1181-1182):

> It is clearly within our power to make a present determination of depletion of supply over time and the requirements of the present or future public convenience and necessity, given an adequate record. We have no factual basis for exercise of abandonment authority here, however, and Belco's application is therefore denied.

See also *Pennzoil Co.*, 50 FPC 977, 990.